

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.
CLERK

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Docket No. 87-1941

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

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LILLIAN SLAY RUSSELL,
Petitioner
vs.

GERALD L. RUSSELL,
Respondent

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

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i.

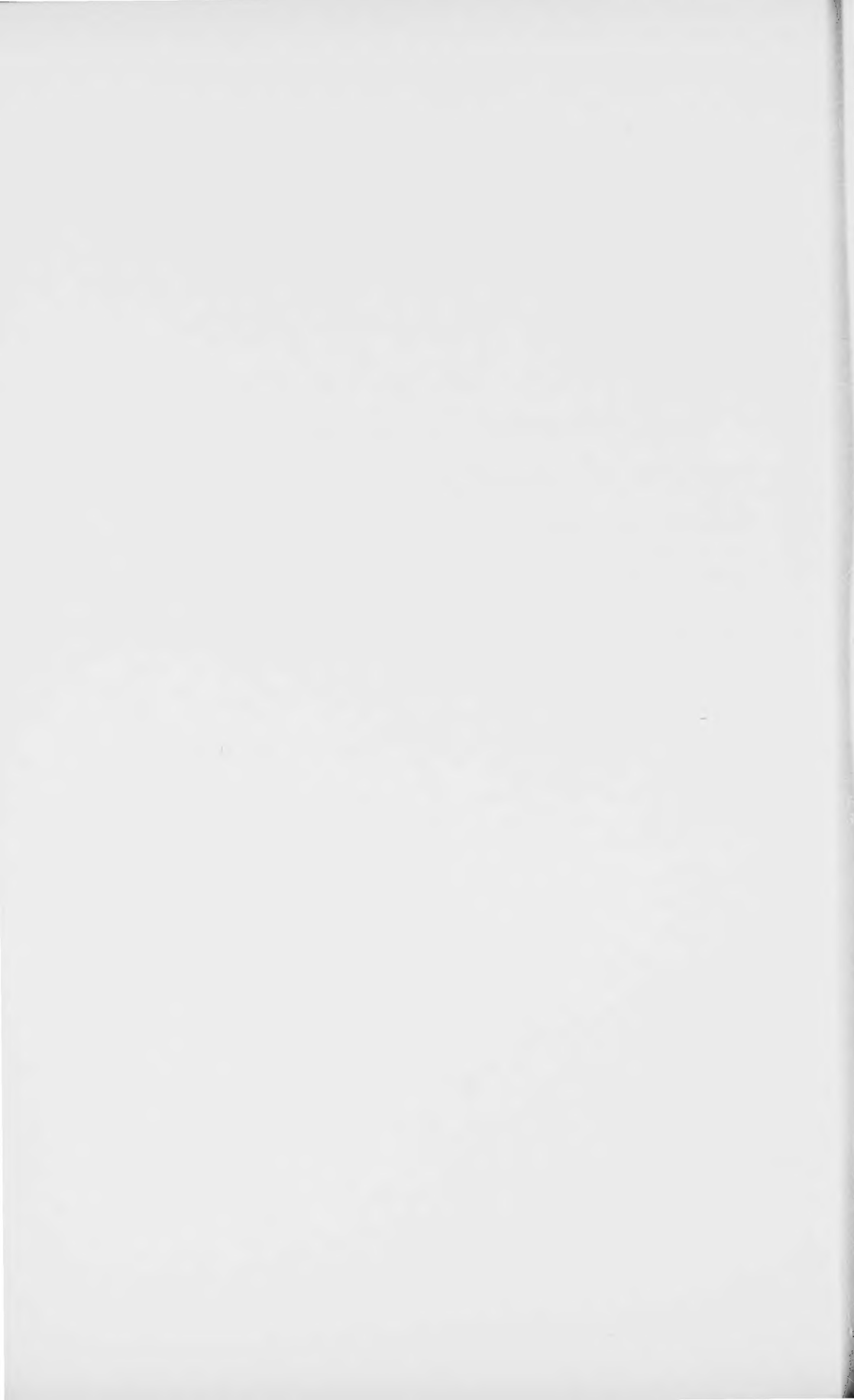
QUESTION PRESENTED

Whether the Supreme Court of the State of Louisiana was correct in denying the writ of certiorari or review filed by petitioner affirming in part, reversing in part and remanding from a judgment from the Ninth Judicial District Court, Parish of Rapides, State of Louisiana.



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STATEMENT OF THE CASE

The facts of the case are stated in the opinion of the Court of Appeals, Third Circuit, State of Louisiana, 520 So.2d at 437 (Petitioner's Appendix A, pp. 6A through 10A)

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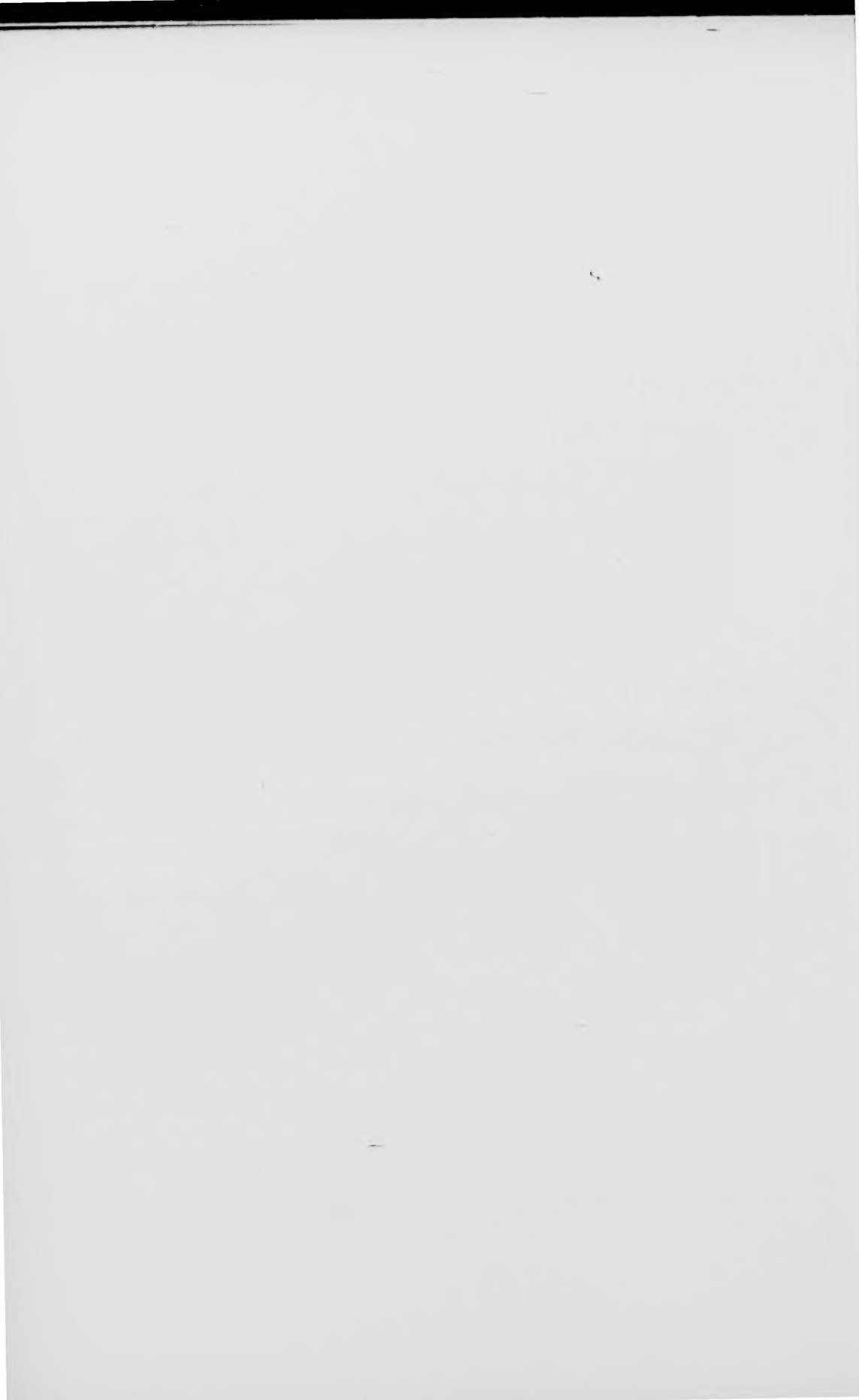
REASONS FOR DENYING THE WRIT OR ALTERNATIVELY, FOR SUMMARY DISPOSITION AFFIRMING THE DECISIONS OF THE COURTS BELOW

- I. Petitioner has not demonstrated any "special and important reasons" warranting the exercise of this Honorable Court's discretionary power of review, as described in U.S. Sup.Ct.Rule 17, 18 U.S.C.A.
- II. The decisions below are in full accord with the principles expressed in decisions of this court, and the Court of Appeals correctly interpreting 10 U.S.C. Section 1408, excluding disability retirement pay from the definition of "disposable, retired or retainer pay."



ARGUMENT

The plaintiff appellant in the instant case sought to have partitioned as community property all amounts, past and future, received and to be received by the defendant appellee resulting from his retirement from the military since plaintiff and defendant were legally separated. The primary issue in this case is whether the retirement benefits being received by the plaintiff, classified as disability benefits, are subject to the community property laws of the State of Louisiana. The defendant-appellee has maintained from the beginning that his disability pay that he has been and is receiving is not subject to the community property laws of Louisiana because of exclusion in 10 U.S.C. 1408 (a)(4). (Petitioner's petition for a writ of certiorari, page 13). Following the original trial the trial court adopted defendant-appellee's argument and held that the military retirement benefits which defendant-appellee is now receiving and which he has received in the past



are disability benefits which, as a matter of law, cannot be treated as community property under Louisiana Community Property Laws.

In McCarty vs McCarty, 453 U.S. 210, 101 Sup. Ct. 2728, 1981, this Court held that Federal Law preempted the application of State Law in the area of military retirement benefits. This court ruled that military retirement benefits were benefits of only the retiring spouse. The following year, Congress responded to the court's ruling in McCarty by enacting the "Uniform Services Former Spouses Protection Act" which legislatively overruled McCarty. Further, Congress set a retro-active effective date on the new Act as of the day that the McCarty decision was handed down. Thereafter the gist of 10 U.S.C. 1408 was that the State could treat the property solely as that of the member or as property of the member and his spouse in accordance with the jurisdiction of the State. Therefore, military retirement benefits were, again, subject to the application of state community property law.

However, there was a distinction made and that distinction was that military retirement benefits do not include disability retirement pay.

Thus, the issue in the instant case parallels that over McCarty:

"The question presented by this case is whether, upon the dissolution of a marriage, federal law precludes a state court from dividing military non disability retired pay pursuant to the state community property law." (at page 2730.)

The facts of Inzinna vs. Inzinna, 456 So.2d 691 (La. App 5th Cir 1984), are similiar to the instant case. In that case, Mr. Joseph Inzinna enlisted in the U. S. Air Force in April, 1947. He and his wife were married in May, 1953. Mr. Irzinna retired from the military in 1969 and the couple was subsequently divorced in May, 1980. In the instant case, Mr. Gerald L. Russell entered the U. S. Army in August 1952. He and his wife were subsequently married in



October, 1958. Mr. Russell retired from the service in September, 1972 and thereafter Mr. & Mrs. Russell separated in January, 1987. Both cases had husbands entering the military prior to becoming married, enjoying an otherwise healthy marriage life, thereafter retiring, and years later obtaining a divorce. In the Inzinna case the court ruled that "disposable retired or retainer pay" for purposes of the Federal Statute exclude disability pay and, therefore, the former wife seeking partition of the community property was not entitled to any portion of her former husband's military service pension which constituted disability pay. The court stated in pertinent part "It is clear from the wording of 10 U.S.C. Section 1408, the applicable statute that 'disposable retired or retainer pay' excludes disability pay, and Mrs. Inzinna is not entitled to any portion of the pension which constitutes such disability pay."

Respondent maintains that the court in Inzinna

correctly identified the issue and correctly interpreted the statute. Thereafter, the trial courts in the instant case correctly identified the issue and correctly decided the case. In both situations the courts uniformly acknowledge the exemption of disability pay from retired pay.

Additionally, we would again like to point out that Mr. Russell retired in 1972 and if the Court did happen to find that the disability retirement pay was community property then the decision would not apply to this case because it was a pre McCarty supra decision.

Congress use of the decision date of McCarty, supra evidenced legislative intent that the law relative to community property treatment of military retirement pension be as though the McCarty decision did not exist; that such pension would be subject to division or community property before and after Supreme Court decision. In re Marriage of Frederick, 190 Cal. Rptr. 588 (Cal. App. 1983).



Petitioner would like the Court to believe that because the respondent retired after 19 years, 11 months and 5 days, he did so with the intent of avoiding payment to his wife of any portion of his pension. The court should note that petitioner is not an attorney and therefore surely did not understand the distinction between disability pay and full retirement pay in the content in which we are speaking. Further, the retirement from the military occurred several years prior to the divorce. Therefore, any argument along these lines are nothing more than a smokescreen.

Twice this case has gone to the Third Circuit Court of Appeal, State of Louisiana. Twice the Third Circuit affirmed in part and reversed in part the judgment of the Trial Court. The judgment concerning the issue of whether Louisiana is precluded from treating military disability retirement benefits as community property was affirmed. However,



part of the case was reversed and remanded on the issue of whether there could be an accurate assessment of whether respondent's retirement benefits were in whole disability or part disability and part non-disability. The trial court determined that Mr. Russell's testimony and exhibits offered in evidence showed conclusively that all of his retirement pay, i.e. 30% of his base pay, is a result of a permanent disability. Therefore, the court concluded that these payments are not susceptible of division in accordance to the community property laws of the state. In so holding, the trial court obeyed the wishes of the Third Circuit Court of Appeal, State of Louisiana. It allowed the respondent the opportunity to offer evidence and show to the extent he could what part if any of the retirement benefits which he is now receiving is, in fact, disability pay. Based on that, the Trial Court made a decision. Because the case was remanded, the Third Circuit was not telling the Trial Court to automatically hold in favor of Mrs. Russell. However, it was telling the Trial Court to allow the



parties to introduce whatever evidence they would so desire, and based upon that, make a decision of whether these payments are 100% disability or a partial non-disability pension. Because the petitioner was unhappy with the Trial Court's reasoning, he appealed to Louisiana Supreme Court and, because the Louisiana Supreme Court denied his writs, he felt that they had decided a Federal question in a way in which conflicts with the decisions of other courts. Respondent maintains nothing could be further from the truth. The Supreme Court for the State of Louisiana has not decided an important question of Federal law which needs to be settled by this Court just because the Supreme Court of the State of Louisiana merely refused writs on a case that had gone up and down the appellate ladder. Accordingly, the respondent maintains that there exists no federal issue and, therefore, the judgments of the lower courts should be affirmed and judgment rendered on respondent's behalf, recognizing that his retirement pension is, indeed, a disability pension and, therefore, falls squarely in

the exclusion enumerated in 10 U.S.C. 1408.

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CONCLUSION

Respondent, Gerald L. Russell, respectfully submits that the petition for writ of certiorari filed by Lillian Slay Russell should be denied. Alternatively, Respondent submits that summary affirmation of the decision below is appropriate.

Respectfully submitted,
LAW OFFICES OF EUGENE P. CICARDO

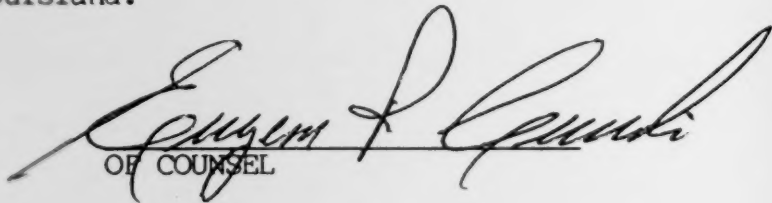
BY: _____

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ATTORNEY FOR RESPONDENT

C E R T I F I C A T E

I hereby certify that three (3) copies of the above and foregoing Respondant's Brief in Opposition for the Petition for Writ of Certiorari has been sent to Roy A. Halcomb, Jr., attorney at law, P.O. Box 1311, Alexandria, Louisiana 71309-1311 by placing same in the United States Mail, postage prepaid, properly addressed, this 2nd day of September, 1988 at Alexandria, Louisiana.


OF COUNSEL

STATE OF LOUISIANA

PARISH OF RAPIDES

BEFORE ME, the undersigned authority, personally came and appeared EUGENE P. CICARDO, who did depose and state that he is counsel of record for GERALD L. RUSSELL in the above and foregoing proceedings and the affiant did on the 2nd day of September, 1988, deposit with Federal Express, with postage prepaid and properly addressed to the Clerk of the United States Supreme Court, the foregoing brief in opposition of the Petition for Writ of Certiorari and that the aforesaid date was within the time allowed for filing by the United States Supreme Court.


EUGENE P. CICARDO

SWORN TO AND SUBSCRIBED before me, notary public, on this 2nd day of September, 1988.


NOTARY PUBLIC



la

APPENDIX: LISTING OF PARENT, SUBSIDIARY
AND AFFILIATE COMPANIES: NOT APPLICABLE